

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
BAY VENTURES
Application for Renewal of 220 MHz
Radio Station WPCX637
Key Largo, Florida
FCC File No. 9809R331904

Order

Adopted: May 14, 2002

Released: May 15, 2002

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 6, 2000, the Commercial Wireless Division's Licensing and Technical Analysis Branch (Branch) denied Repeater Network Spectrum Aq., Inc.'s (Repeater) petition to deny and granted Bay Ventures' (Bay) above-captioned application for license renewal. On April 5, 2000, Repeater sought reconsideration of the grant (April 2000 Petition) and the Branch denied the petition on April 30, 2001. Repeater filed a second petition on May 24, 2001, seeking reconsideration of the Branch's dismissal of its April 2000 Petition (May 2001 Petition). For the reasons discussed below, we affirm our decision to renew Bay's license for station WPCX637.

II. BACKGROUND

2. On September 8, 1998, Bay filed the above-captioned renewal application for Station WPCX637 in Key Largo, Florida. The Branch placed the application on public notice on December 11, 1998, and on January 11, 1999, Repeater, the geographic area licensee for the Miami-Fort Lauderdale market (BEA031, channel block D), filed a petition to deny Bay's renewal application. In its petition to deny, Repeater alleged that Station WPCX637 had not been constructed and, therefore, had not provided substantial service during its past license period - a showing required by Section 90.743(a) of the Commission's rules for 220 MHz Phase I license renewal applications.

3. On February 4, 1999, Repeater submitted a declaration by Robert Fejes in a supplement to its petition to deny based on Fejes' observations of the station facilities for WPCX637 on two separate days in January 1999. Fejes stated that he detected no transmissions on any of the channels licensed

1 Petition to Deny filed by Repeater Network Spectrum Aq., Inc. (Jan. 11, 1999).

2 Petition for Reconsideration filed by Repeater Network Spectrum Aq., Inc. (Apr. 5, 2000).

3 Petition for Reconsideration filed by Repeater Network Spectrum Aq., Inc. (May 24, 2001).

4 FCC Renewal Application File No. 9809R331904 (Sept. 8, 1998).

5 Public Notice, Report No. 2019 at 158 (Dec. 11, 1998).

under WPCX637 on either day.<sup>6</sup> By letter dated February 22, 2000, the Branch requested additional information from Bay pursuant to Section 308(b) of the Communications Act of 1934, as amended,<sup>7</sup> about the construction and operation of Station WPCX637 (Section 308(b) Inquiry).<sup>8</sup> On March 2, 2000, the station manager, Securicor Wireless Inc. (Securicor), responded to the Branch's inquiry on behalf of Bay, submitting evidence that Station WPCX637 has and continues to provide substantial service, as defined in the Commission's rules (Section 308(b) Response).<sup>9</sup>

4. On March 6, 2000, the Branch granted Bay's renewal application and denied Repeater's petition to deny.<sup>10</sup> In denying the petition, the Branch found that the station had been constructed and operational since November 15, 1995. In addition, the Branch was satisfied from Bay's Section 308(b) Response that Station WPCX637 had provided substantial service during its past license term. The Branch further explained Repeater failed to demonstrate that Station WPCX637 had permanently discontinued operations for one year or more and, therefore, failed to provide a basis for automatic termination of the license.<sup>11</sup>

5. On April 5, 2000, Repeater filed its April 2000 Petition seeking reconsideration of the Branch's grant of Bay's renewal application for station WPCX637.<sup>12</sup> In that petition, Repeater argued that Bay's license should not be renewed because (1) Bay's Section 308(b) Response was untimely and improperly filed, and non-responsive; (2) the license has undergone an unauthorized transfer of control; (3) the station has not provided substantial service because it has not been operational for possibly several years; and (4) the facilities are not operating in substantial compliance with the specifications of its station authorization. The April 2000 Petition also included a second declaration by Robert Fejes. Mr. Fejes visited the site again on March 23, 2000, and stated in his declaration that he detected no transmissions from the station. On June 29, 2000, Bay and Securicor filed a Joint Opposition to Repeater's April 2000 Petition.<sup>13</sup>

6. By letter dated April 30, 2001, the Branch dismissed Repeater's April 2000 Petition, finding the petition had not been timely filed at the proper location.<sup>14</sup> On May 24, 2001, Repeater filed a

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<sup>6</sup> Supplement to Petition to Deny filed by Repeater Network Spectrum Aq., Inc. (Feb. 4, 1999). In his declaration, Mr. Fejes stated that he visited the facilities for Station WPCX637 on January 9, 1999, and January 16, 1999, and monitored the station's frequencies without detecting any transmissions. *Id.* at 3. Mr. Fejes further stated that on January 16, 1999, he gained access to the tower and found that the repeaters were not in operation, and a number of equipment modules were missing. *Id.*

<sup>7</sup> 47 U.S.C. § 308(b).

<sup>8</sup> Letter to Bay Ventures, from Ronald B. Fuhrman, Deputy Chief, Technical Analysis Section, Commercial Wireless Division, Federal Communications Commission (Feb. 22, 2001).

<sup>9</sup> Letter to Ronald B. Fuhrman, Deputy Chief, Technical Analysis Section, Commercial Wireless Division, Federal Communications Commission, from Brett D. Kynard, FCC Licensing Manager, Securicor Wireless Inc. (Mar. 2, 2000).

<sup>10</sup> Letter to Alan S. Tilles, counsel to Repeater Network Spectrum Aq., Inc., from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Branch, Wireless Telecommunications Bureau, Federal Communications Commission (Mar. 6, 2000).

<sup>11</sup> *Id.* (citing former 47 C.F.R. § 90.157(b)).

<sup>12</sup> April 2000 Petition.

<sup>13</sup> Joint Opposition to Petition for Reconsideration (June 29, 2000) (Joint Opposition).

<sup>14</sup> Letter to Alan Tilles, counsel to Repeater Network Spectrum Aq., Inc., from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Branch, Wireless Telecommunications Bureau, Federal Communications Commission (Apr. 30, 2001).

petition seeking reconsideration of the dismissal of its April 2000 Petition.<sup>15</sup> In response, on June 6, 2001, Securicor refiled a copy of its June 29, 2000 Joint Opposition, stating that its responses to Repeater's allegations remain unchanged.<sup>16</sup>

### III. DISCUSSION

#### A. May 24, 2001 Petition for Reconsideration

7. In its May 2001 Petition, Repeater states that it complied with the Commission's filing requirements by filing its April 2000 Petition in a timely manner at the proper location. Under Commission rules, petitions for reconsideration must be filed within 30 days from the date of public notice of the final Commission action with the Office of the Secretary in Washington D.C.<sup>17</sup> Repeater demonstrated that it complied with these requirements by filing a date-stamped copy of the April 2000 Petition indicating that it was filed with the Secretary's office on April 5, 2000, 30 days after the release of the Branch's decision on March 6, 2000. Repeater further explains that the copy it sent to the Commission's Gettysburg, Pennsylvania office was a courtesy copy only.<sup>18</sup> Accordingly, we grant Repeater's May 2001 Petition and address the issues raised in the April 2000 Petition.

#### B. Consideration of Bay's Section 308(b) Response

8. Repeater presents several arguments in its April 2000 Petition to support its assertion that grant of the renewal application should be reversed because the Branch should not have considered the information submitted in the Section 308(b) Response. Repeater first contends that the Section 308(b) Response was untimely filed because, under Commission rules, oppositions to petitions to deny must be filed within ten days after the petition is filed.<sup>19</sup> Repeater further complains that because it was not served the Section 308(b) Response pursuant to Section 1.939(c) of the Commission's rules, Repeater was denied the right to reply.<sup>20</sup> While Repeater is correct about the deadline under Section 1.45 of the Commission's rules<sup>21</sup> for filing oppositions to petitions to deny, Bay submitted the information in response to the Branch's request for additional information pursuant to Section 308(b) of the Communications Act, as amended. Section 308(b) is a tool in the statute that provides the Commission with the authority to obtain written statements of fact at any time in a proceeding from applicants and licensees so that the Commission can determine whether the application should be granted or denied.<sup>22</sup> Accordingly, the Section 308(b) Response was not an opposition to Repeater's petition to deny and therefore was not required to be filed within ten days of the date on which Repeater filed its petition to deny.

9. For the same reasons, the service rule for filing oppositions to petitions to deny is inapplicable in this case. Under Section 1.939(c) of the Commission's rules, parties must serve oppositions to petitions to deny on the petitioner and all other interested parties.<sup>23</sup> As we have already

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<sup>15</sup> May 2001 Petition.

<sup>16</sup> Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, from Angela M. Simpson, counsel to Securicor Wireless, Inc. (June 6, 2001).

<sup>17</sup> 47 C.F.R. §§ 1.106(f) and (i).

<sup>18</sup> May 2001 Petition at 2-3.

<sup>19</sup> April 2000 Petition at 4 (citing 47 C.F.R. § 1.45).

<sup>20</sup> April 2000 Petition at 4.

<sup>21</sup> 47 C.F.R. § 1.45.

<sup>22</sup> 47 U.S.C. § 308(b).

<sup>23</sup> 47 C.F.R. § 1.939(c).

discussed, the Section 308(b) Response is not an opposition to a petition to deny and, therefore, Bay was not required under Section 1.939(c) to serve a copy of the response on Repeater. We note, however, that even if service were required, any error was harmless because Repeater in fact obtained a copy of Bay's response. Moreover, we note that Repeater was not harmed by any delay. The Branch took immediate action once it received the Section 308(b) Response and Repeater filed its April 2000 Petition in a timely manner. Any reply to the Section 308(b) Response would have been filed within the same time period.

10. Repeater further contends that the Branch erred in considering Bay's Section 308(b) Response because it was filed by a non-party to the proceeding and not verified by a declaration under penalty of perjury. Repeater argues that the Section 308(b) Response is invalid because Bay's station manager, who is not an attorney, signed the document without verification.<sup>24</sup> Section 1.52 of the Commission's rules requires an attorney of record to sign any document filed with the Commission in his or her individual name and address. A party who files a document, but is not represented by counsel, must sign and verify the document and state his or her address.<sup>25</sup>

11. We find good cause to waive the verification requirement of Section 1.52 of the Commission's rules.<sup>26</sup> Under Section 1.52, "[i]f the original of a document is not signed or is signed with intent to defeat the purpose of this section . . . it may be stricken as sham and false, and the matter may proceed as though the document had not been filed."<sup>27</sup> Bay's station manager signed the Section 308(b) Response. Moreover, we find no reason to believe that Bay intended to defeat the purpose of Section 1.52 or that the documents submitted are sham or false. We disagree with Repeater's argument that "anyone could have submitted a document such as that submitted by Securicor."<sup>28</sup> The information requested in the Section 308(b) Inquiry was the type of information that a station manager reasonably would have in its possession. Consideration of Bay's response is therefore warranted to ensure a thorough review of the issues regarding the construction and operation of Station WPCX637.

12. Repeater also argues that Bay did not answer four of the five questions asked in the Section 308(b) Inquiry and, as a result, the Branch should not have considered the response in deciding whether to renew Bay's license.<sup>29</sup> We disagree. The Branch found that the information provided in the Section 308(b) Response was sufficient to determine whether Bay's license should be renewed.<sup>30</sup> While Repeater contends that Bay's answer was inadequate, it fails to demonstrate why the information provided was insufficient for the purpose of deciding whether WPCX637 is constructed and operating.

### C. Unauthorized Transfer of Control

13. Repeater also alleges that the Section 308(b) Response shows that Bay has made no investment in its system and that there has been an unauthorized transfer of control of Station WPCX637

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<sup>24</sup> April 2000 Petition at 4.

<sup>25</sup> 47 C.F.R. § 1.52.

<sup>26</sup> 47 C.F.R. §1.3; In re Applications of Knox Broadcasting, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 3337, ¶ 2 (1997).

<sup>27</sup> 47 C.F.R. §1.52.

<sup>28</sup> April 2000 Petition at 4.

<sup>29</sup> April 2000 Petition at 6.

<sup>30</sup> In the Section 308(b) Response, Securicor included a notice of rent increase for the station site dated September 15, 1997; invoices dated September 29, 1995, and November 30, 1995, for the purchase of equipment; an equipment and charges detail dated January 17, 1995; an authorization dated September 7, 1995, for equipment installation; and the declaration of the operations manager certifying that Station WPCX637 had been constructed and was placed in operation on November 15, 1995. Section 308(b) Response at Ex. 2 through 6.

from Bay to Securicor or Roamer One, Inc. (Roamer One), a subsidiary of Securicor.<sup>31</sup> Repeater first urges the Commission to note that Bay did not submit a management agreement as part of its Section 308(b) Response.<sup>32</sup> Repeater also offers the following facts in support of its allegation: the equipment invoices included in the Section 308(b) Response show Roamer One as the “customer;” the equipment installation agreement is between Roamer One and Simmonds Communication LTD; the site lease is sent to Roamer One’s offices; and Bay has never responded to Commission correspondence.<sup>33</sup>

14. Based upon the facts before us, we find that Repeater has failed to provide sufficient evidence to substantiate its allegation that Bay transferred control of its facilities to Securicor or to Roamer One.<sup>34</sup> As an initial matter, Repeater seems to suggest that by not offering a copy of the management agreement, Bay may be hiding the identity of the actual licensee in this case. The Commission permits licensees to enter into management agreements, provided that licensees retain *de facto* control over their licensed facilities,<sup>35</sup> and Repeater’s concern that Bay did not provide a copy of its management agreement does not support an allegation of unauthorized transfer of control. In fact, the Section 308(b) Inquiry did not request a copy of the management agreement nor was Bay otherwise obligated to provide a copy of its management agreement to the Branch.

15. Nor does the information that Repeater cites from the Section 308(b) Response about the management agreement support a finding of an unauthorized transfer of control. With respect to Repeater’s allegations about equipment invoices and equipment installation, Bay explains that under its management agreement, Roamer One “sells the equipment to Bay Ventures in an installment sale,” and “contracted with Simmonds Communications to perform the system installation.”<sup>36</sup> Bay also explains that while Bay is a signatory to the site lease, Roamer One’s address is on the lease because Roamer One is Bay’s billing agent and is responsible for invoice payment services.<sup>37</sup> Finally, Bay notes that it responded to Commission correspondence when it signed the renewal application for Station WPCX637 and instructed Securicor to respond to the Section 308(b) Inquiry.<sup>38</sup> Based upon the record in this proceeding, we find no basis on which to conclude that there has been an unauthorized transfer of control of Station WPCX637 to Securicor or Roamer One.

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<sup>31</sup> April 2000 Petition at 7-8.

<sup>32</sup> April 2000 Petition at 7.

<sup>33</sup> April 2000 Petition at 7.

<sup>34</sup> The Commission developed criteria in *Intermountain Microwave* for the purpose of analyzing transfer of control issues in, among others, certain wireless services: (1) does the licensee have unfettered use of all facilities and equipment? (2) who controls daily operations? (3) who determines and carries out policy decisions, including preparing and filing applications with the Commission? (4) who is in charge of employment, supervision, and dismissal of personnel? (5) who is in charge of payment of financial obligations, including expenses arising out of operation? and (6) who receives monies and profits from the operations of the facilities? *Intermountain Microwave, Public Notice*, 12 F.C.C. 2d 559, 560 (1963). With respect to private radio licenses, the Commission historically has considered transfer of control issues in light of the factors set forth in its *Motorola* decision, which focus on issues pertaining to the licensee’s supervision of its system and its propriety interest in equipment. Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked Systems, File Nos. 507505 *et al.*, *Order* (PRB rel. July 30, 1985).

<sup>35</sup> See Marc Sobel, *Decision*, 17 FCC Rcd 1872, ¶ 53 (2002) (“licensees may hire entities to manage their SMR systems but they may not contract away control of their systems”).

<sup>36</sup> Joint Opposition at 12.

<sup>37</sup> Joint Opposition at 12-13.

<sup>38</sup> Joint Opposition at 12-13.

**D. Substantial Service/Operational Status of Station WPCX637**

16. Repeater next argues that WPCX637 could not have provided substantial service sufficient to meet the Commission's renewal standard. Commission rules require Phase I 220 MHz licensees to demonstrate in their renewal applications that they have provided substantial service during their past license term and that they have substantially complied with Commission rules, policies, and the Communications Act, as amended.<sup>39</sup> Repeater argues that Bay has failed to meet this standard because WPCX637 has been non-operational, stating that "[t]he system remains today in the same non-operational state found by Repeater one year ago."<sup>40</sup> Further, Repeater states that "at a minimum, from August 16, 1996 through February 16, 1998 at least one channel was no[t] operational at the site," and therefore concludes that "at a minimum, the Commission must cancel the license for this channel."<sup>41</sup>

17. Repeater reaches its conclusion that the station was not operating in the past based on its analysis of entries in the "site log notes" provided in Bay's Section 308(b) Response. According to Repeater, the site log shows that one of the five authorized channels was not in operation on eight days between August 16, 1996, and September 9, 1997.<sup>42</sup> Repeater also references a log entry dated February 16, 1998, which stated that the system was "not operational."<sup>43</sup> Based on these nine entries, Repeater concludes that at least one channel on the system was non-operational from August 16, 1996, to February 16, 1998.<sup>44</sup> Repeater also argues that Robert Fejes' inspection of the facilities in January 1999, and March 2000, demonstrates that the system continues to be non-operational.<sup>45</sup> Repeater concludes that "Securicor is perpetrating a fraud on the Commission and its processes."<sup>46</sup>

18. Section 90.157 of the Commission's rules provides that a station license must terminate automatically if operations are permanently discontinued. The rule section further defines "permanently discontinued" as any station that has not operated for one year or more.<sup>47</sup> Repeater has failed to provide adequate information to demonstrate that operations at Station WPCX637 have been permanently discontinued. Even if the station were not operating on these particular dates, individual site-log entries and isolated visits do not provide sufficient evidence to demonstrate that the system was not operating for a period of one year or more. Repeater has therefore failed to provide evidence regarding the station's operational status sufficient to make a determination that the license for Station WPCX637 has automatically terminated. Repeater has also failed to provide evidence on which to support a reversal of the Branch's determination that Bay provided substantial service during its past license term.

**E. Substantial Compliance with the Station License**

19. Finally, Repeater argues that Bays' license should be revoked because the facilities for WPCX637 were not constructed in substantial compliance with its license. Specifically, Repeater states

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<sup>39</sup> 47 C.F.R. § 90.743(a).

<sup>40</sup> April 2000 Petition at 8.

<sup>41</sup> April 2000 Petition at 5.

<sup>42</sup> April 2000 Petition at 5. Repeater states that the site-log notes show that one channel was non-operational on August 16, 1996, July 31, 1997, August 1, 1997, August 14, 1997, August 22, 1997, September 8, 1997, and September 9, 1997. *Id.*

<sup>43</sup> April 2000 Petition at 5-6.

<sup>44</sup> April 2000 Petition at 5-6.

<sup>45</sup> April 2000 Petition at 7.

<sup>46</sup> April 2000 Petition at 7.

<sup>47</sup> 47 C.F.R. § 90.157.

that the antenna height for WPCX637 is licensed at 200 feet, but that a site-log entry in 1998, described the height at 170 feet and on the January 1999 inspection, Repeater recorded the height at 130 feet. Repeater cites to the Commission's decision in *Robert A. Berry* to support its argument that the disparity between constructed and authorized antenna height warrants revocation of Bay's license.<sup>48</sup> We disagree. In *Robert A. Berry*, the Commission stated that factors such as the antenna height and the extent of operations are indicia of temporary construction that might support a finding that a licensee has not satisfied its construction requirements.<sup>49</sup> In particular, the Commission described the determinative factors for terminating Berry's license to be the extreme discrepancy between the licensed antenna height and the constructed height, where the antenna in question was authorized for operation at 654 feet, but was placed at 60 feet; the brevity of operations; the decision not to rent space on the tower beyond the brief period of operations, and the decision to move the equipment to a building without electricity.<sup>50</sup> Thus, in *Robert A. Berry*, the antenna height was only one of several factors used to determine construction of the station. In contrast, we find that a single allegation of a potential 30 to 70-foot discrepancy in antenna height is insufficient to warrant termination of Bay's license at this time.<sup>51</sup>

20. We are concerned, however, that Bay may not be in compliance with Commission rules that require licensees to notify the Commission that it has modified its station within 30 days after the modifications are completed. Specifically, Section 90.745(a) of the Commission's rules allows Phase I licensees to add, remove, or modify transmitter sites within their existing service area without prior notification as long as their predicted 38 dBu service contour is not expanded. Under the rule, however, incumbent licensees must notify the Commission within 30 days of the completion of any changes in technical parameters constructed through a minor modification.<sup>52</sup> We believe that Bay may have failed in this case to comply with the 30-day notification requirement with respect to any modification to its antenna height. In fact, in its Joint Opposition, Bay and Securicor state that they "will assess the antenna height at the Station and file any necessary notification with the Commission."<sup>53</sup> Accordingly, Bay must, within 30 days of the release date of this Order, submit any necessary notifications to the Commission required under Section 90.745(a) of the Commission's rules. If any relevant modifications were completed more than 30 days prior to any notification, Bay must also submit a request for waiver of the notification requirement in Section 90.745(a) along with an explanation for the delay.

#### IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106, that the Petition for Reconsideration filed by Repeater Network Spectrum Aq., Inc. on May 24, 2001 IS GRANTED.

22. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the

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<sup>48</sup> April 2000 Petition at 6, n.5.

<sup>49</sup> In the Matter of Robert A. Berry, *Memorandum Opinion and Order*, 11 FCC Rcd 9457, ¶ 2 (1996) (*Robert A. Berry*).

<sup>50</sup> *Id.* at 9460, ¶ 6.

<sup>51</sup> Repeater also alleges that the antenna was adjusted to a height of 400 feet. Repeater bases this allegation of an entry in the "site log notes," dated February 16, 1998, where it is noted that the antenna should be moved to 400 feet. There is no evidence, however, that Bay actually increased the antenna height to 400 feet: the log entry for February 16, 1998 specifically includes moving the antenna to 400 feet in a list of "[s]ystem work yet to be done" and no subsequent site log entry indicates that the antenna height was, in fact, modified.

<sup>52</sup> 47 C.F.R. § 90.745(a).

<sup>53</sup> Joint Opposition at 10, n.21.

Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106, that the Petition for Reconsideration filed by Repeater Network Spectrum Aq., Inc. on April 5, 2000 IS DENIED.

23. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.331, 1.106, and 90.745 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106, 90.745, Bay Ventures must provide within 30 days of the date of this Order any notification required under Section 90.745 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari  
Chief, Policy and Rules Branch  
Commercial Wireless Division  
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